No. 10339.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. McFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINE B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS' COMPANY, INC., a corporation,

Appellants,

vs.

STELLA DYSART, individually and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLANTS' OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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Appellants,

vs.

STELLA DYSART, individually and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLANTS' OPENING BRIEF.

Facts and Authorities Regarding Jurisdiction.

Appellants filed their respective creditors' and intervenors' petitions in bankruptcy in the District Court of the United States for the Southern District of California. Original petition filed July 5, 1941. [Tr. p. 10.] Intervening creditors' petition filed July 29, 1941. [Tr. p. 37.] Second intervening petitioning creditors filed October 17, 1941. [Tr. p. 54.]

The said court had jurisdiction of said proceedings by virtue of subdivision (1) of Section 2(a) and subdivisions (a), (b) and (d) of Section 5 of the Bankruptcy Act.

A final order dismissing said proceedings was entered November 7th, 1942. [Tr. p. 147.]

Notice of appeal was filed by appellants on November 23, 1942. [Tr. p. 149.]

Order extending time to file record on appeal was made and filed December 7, 1942. [Tr. pp. 153-4.]

Appellants rely on provisions of subdivisions (a) and (b) of Sections 24 and 25(a), Bankruptcy Act, to sustain jurisdiction of Circuit Court.

The proceedings were completed pursuant to Federal Rules of Civil Procedure, Rule 73 (a), (b), (c) and (g) and Rule 75.

Statement of the Case and Question Involved.

Three sets of creditors, totaling fifty-two in number, filed their respective petitions in bankruptcy, seeking to adjudicate Stella Dysart a bankrupt. The original creditors' petition was followed by a first intervening creditors' petition and a second intervening creditors' petition. Each creditor alleged that he was an unsecured creditor.

The acts of bankruptcy alleged are made expressly within the provisions of subdivision 3, Section 3 of Chapter 3 of the Bankruptcy Act, to-wit:

> *"Section 3, Acts of Bankruptcy.*
>
> (a) Acts of Bankruptcy by a person shall consist of his having (1) * * * (2) * * * (3) suf-

> fered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof, or at least five days before the date set for any sale or other disposition of such property;"

The petitioning creditors expressly set forth the facts which constituted such act of bankruptcy alleging that one Mary Christianson had obtained a judgment in McKinley County, New Mexico; had levied a writ of execution within four months prior to the filing of the bankruptcy proceeding, had levied upon *personal* property of the bankrupt, and that the Sheriff of McKinley County had sold the *personal property* at public auction, and that the bankrupt had not vacated or discharged the lien, either within thirty days from the date thereof, or had not discharged the lien within five days before the sale, and that the property had gone to sale and had been lost to general creditors.

Upon the trial, the petitioning creditors offered in evidence an exemplified copy of the following papers in the Christianson v. Dysart case: The exemplified record showing the judgment, *three* writs of execution, the return of the Sheriff showing the levy on the *personal property* and the nature thereof, the Sheriff's return showing he had made a sale under the execution, and the order of the court approving and confirming such Sheriff's sale. These records bore the certificate of the custodian of the record, to-wit: the clerk of the court, the certificate of the judge of the court, and the certificate of the clerk certifying

to the capacity of the judge. [Tr. pp. 144-145.] No objection was made to the form in which the record was taken.

"Mr. Turnbull: There was a previous bankruptcy proceeding which resulted in adjudication by the Circuit Court and reverse of it by the United States Circuit Court of Appeal on the ground that the act of bankruptcy was not completely proven. I make that statement because some of the records that are being brought here from New Mexico today will be complete, whereas heretofore they were not.

The Court: All right.

Mr. Turnbull: The petitioning creditors and the intervening creditors at this time offer in evidence an exemplified copy of a record of a proceeding in which Mary T. Christensen is plaintiff and judgment creditor and in which the alleged bankrupt, Stella Dysart, was defendant. That record is one bearing the certificate of Eva Ellen Saben, the clerk of the District Court in and for the County of McKinley, New Mexico; the certificate of District Ju*st* Kool, and the certificate of Eva Ellen Saben, the clerk of the court, that the Judge is the Judge, which certificates on the part of the clerk are under seal of that court and which record, so certified, consists first of a judgment in favor of Mary T. Christiansen against Stella Dysart, as appears on its face, a series of executions, particularly one we are interested in here, however, being the one containing the sheriff's levy and the sale of which was had [5] on the 7th of July, 1941.

The Court: Is that in support of paragraph 6 of your original petition?

Mr. Turnbull: I don't know the number. It is the one of Mary T. Christiansen's judgment.

The Court: Yes.

Mr. Turnbull: It appears that the procedure in New Mexico is that after the sheriff makes a sale he reports that sale to the court, and the court makes, and apparently in this case made, an order approving the sale. But the record here being offered is the judgment, the execution of 1941, with respect to the sale of the 7th of July, 1941, and the sheriff's bill of sale and the order approving the sale as made by the Judge of the court." [Tr. pp. 159-160.]

Objection was made by the bankrupt, however, that the record was not admissible in evidence on the ground that the record did not show or tend to show an act of bankruptcy. The court sustained the objection. The petitioning and intervening creditors then offered to prove that Stella Dysart was insolvent at the time the creditors' petitions were filed and at the time of the sale and for a period of four months continuously prior to the creditors' filing of petitions. The petitioning creditors offered [Tr. pp. 225-226] to prove that they, and each of them, were creditors having provable claims against the bankrupt in excess of any securities, and that their claims aggregated in excess of the statutory five hundred dollars in amount, and that they, and each of them, had no security for their claims. The said creditors, and each of them, offered to prove that Stella Dysart owed debts in excess of the statutory one thousand dollars, and was insolvent.

"The petitioners then made an offer of proof to prove that each and every petitioning creditor set forth in the original petition filed herein on the 5th

day of July, 1941, [128] and each and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 29th day of July, 1941, and every intervening petitioning creditor named and set forth in the petition of creditors to intervene, and supplemental involuntary petition of creditors filed herein on the 17th day of October, 1941, had provable claims against the said alleged bankrupt at the time and in the amounts set forth in the aforesaid petitions, and further offered to prove that at the times set forth in the said petitions, the said petitioning and intervening petitioning creditors had provable claims against the said alleged bankrupt in the sum in excess of five hundred ($500.00) dollars, which were past due and unpaid, and that at the times set forth in the said petitions the said bankrupt owed debts in excess of one thousand ($1,000.00) dollars, and further offered to prove that at all of the times set forth and mentioned in the said petitions and at the dates of the alleged acts of bankruptcy that the said alleged bankrupt was insolvent. The said alleged bankrupt thereupon resisted the offers of proof, which said resistance was sustained by the court and the offers of proof denied." [Tr. pp. 146-147.]

An objection was made to such offer of proof by the bankrupt on the ground that no act of bankruptcy had been proven or could be proven under the ruling of the court, and the said objection was sustained and the creditors, and each of them, were denied the right to proceed to prove any of the matters offered to be proven. The court thereupon made its order dismissing the respective

creditors' petitions and dismissing the entire bankruptcy proceeding; the reason given by the court for his decision in the matter was that under the laws of the State of New Mexico, a judgment was a lien upon any real property of the judgment debtor and that as the law made it a lien, no subsequent levy of a writ of attachment upon *personal* property could create a new or different lien which would constitute an act of bankruptcy.

It was stipulated by all parties that under the laws of New Mexico a judgment was not a lien upon personal property. [Tr. p. 175.]

Question Involved.

Does the existence of a state law making a judgment an apparent lien on real property (but not on personalty) *ipso facto* prevent other creditors of the judgment debtor from urging as an act of bankruptcy a new and subsequent levy of execution and sale of personal property within the inhibited four months' period before bankruptcy?

Statement of Facts.

The statement of the case, as hereinbefore recited, of necessity contains the facts; they are not repeated here. We must keep in mind that on the third writ of execution the levy and sale was on *personal* property and made within the four months' period prior to THIS bankruptcy.

ARGUMENT.

POINT I.

The Trial Court Committed Reversible Error When It Refused to Accept as Evidence the Exemplified Record Showing a Judgment, Execution, Levy of Execution, Sale Within Four Months, of Personal Property Under Execution, and the Order of the New Mexico Court Approving and Confirming Such Sale and Sheriff's Bill of Sale.

These same original petitioning creditors were before this court approximately a year ago on a bankruptcy of the same title as the instant case. At that time these original petitioning creditors came to this court as respondents on an appeal from an adjudication in bankruptcy. This court held that the proof offered at that trial, to-wit: the offer *only* of the judgment, the execution, and the levy of the execution in the case of Mary Christianson, plaintiff, v. Stella Dysart, was not sufficient proof of an act of bankruptcy under subdivision 3 of Section 3 of the Bankruptcy Act. This court held that while is was proved that a judgment existed and an execution levy had been made upon *personal property,* there was no presumption that could be indulged in that there had been an actual sale of the property, or that the bankrupt had not, within five days, had the levy vacated or discharged, or had other disposition made of the property. This court said that it was necessary for the petitioning creditors to prove every one of the factors which were essential to the act of bankruptcy, defined in said subdivision 3 of Section 3, to-wit: That there was a judgment; that there was a levy on property, and that there was a sale set and had which was not disposed of by the bankrupt within at least five days before such sale.

After the decision by this court and the reversal of the trial court, the bankrupt proceeding was dismissed. The original petitioning creditors then filed a new petition seeking the adjudication of the same Stella Dysart. They were joined by other creditors who filed intervening petitions. It is that second case which is now before this court.

Upon the trial of this action the petitioning and intervening creditors offered in evidence the exemplified copy of the record of the case of Mary Christianson v. Stella Dysart. It was duly exemplified by the certificate of the clerk of the court rendering the judgment, the certificate of the judge of that court, and the certificate of the clerk attesting to the capacity of the judge. The exhibit is in the record herein as Petitioners' Exhibit No. 1, for identification. [Tr. pp. 76-120, incl.] It consists of the judgment showing Mary Christianson was a judgment creditor of Stella Dysart, to which is added three writs of execution, to which is added the Sheriff's return with respect to the levy of that writ of execution upon personal property of Stella Dysart in McKinley County, New Mexico, all within the four months' period prior to the filing of the creditors' petitions herein, to which is added the Sheriff's return that he had sold the property on the date given in the notice of sale, to which is added the decree or order of the court in McKinley County, New Mexico, confirming and approving the sale as so had by the Sheriff. The first two writs of execution referred to previous levies and are not essential to the proof of the act of bankruptcy herein relied upon.

It will be noted that the levy was made within the one hundred and twenty day period, prior to the filing of the creditors' petitions, and that the sale of the personal prop-

erty under execution occurred within such period. Petitioners assert that they have offered to prove and have proven in the manner approved by the law, the act of bankruptcy alleged. We assert that we have offered the best evidence—the record duly authenticated—and that it constitutes an act of bankruptcy as defined by subdivision 3 of Section 3 of Chapter 3 of the Bankruptcy Act. The levy of the writ of execution constituted a lien. That lien was not discharged or vacated at any time, either within the five days' period, or at all. The date set for the sale was definite and the sale occurred on that date. The bankrupt did not cause "other disposition of such property" to be made.

Authorities.

In discussing this act of bankruptcy, Collier says in the 12th Edition:

> "This has been well termed 'passive act of bankruptcy.' It differs from the corresponding act in the law of 1867, in that intent is not material. * * * There is a similar provision in the Canadian Bankruptcy Act of 1919. The corresponding clause in the English Bankruptcy Act is also of interest."
>
> *Collier's,* 12th Ed., p. 106.

> "On the question as to whether intent is an element in this act of bankruptcy, the earlier and most of the later cases have held that intent had been dropped out, and that result,—the inequity flowing from the transaction, rather than the animus of it—had been substituted instead. * * * The question reached the Supreme Court late in 1901, and was then settled by a five-to-four decision in Wilson Bros. v. Nelson, which, reversing the court below, upholds the

majority of the previous cases, and finally determines that intent is not an element of pleading or proof where the third act of bankruptcy is relied on. As therein stated the act 'makes the result obtained by the creditor and not the intent of the debtor the essential fact.' In other words, it is now the settled law that an insolvent may be thrown into bankruptcy by the requisite number of his creditors, if a judgment has been entered against him, execution issued and levy made, and sale five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him. This, from the creditor's standpoint, is the high-water mark of Anglo-Saxon 'acts of bankruptcy.' "

Collier's, 12th Ed., pp. 107-108.

" 'Legal proceedings' means proceedings in a court to assert a legal remedy to obtain an equitable relief. They include all proceedings in a court of justice, interlocutory or final, whereby the property of the debtor is seized and diverted from the general creditors. The issuance of execution and a levy under a confession of judgment was 'legal proceedings' within the clause."

Collier's, 12th Ed., p. 110.

" 'Sale or final disposition' as used in this clause means an act having the effect of a sale whereby the ownership and control of the property is transferred from one person to another."

Collier's, 12th Ed., p. 111.

"It is not the judgment itself or the levy thereunder which constitutes the act of bankruptcy, but the failure on the part of the debtor to have the same

vacated or discharged five days before a sale or the final disposition of the property."

Collier's, 12th Ed., p. 112.

Citing:

In re Vastbinder, 113 Bankruptcy Repts. 118, 126 Fed. 417;

Matter of Rung Furn. Co. (Circuit Court of Appeals of the Second Circuit), 14 A. B. R. 12, 139 Fed. 526;

Folger v. Putnam (Circuit Court of Appeals for the 9th Circuit), 28 A. B. R. 173, 194 Fed. 733.

In the case of *Citizens Banking Company v. Ravenna* Bank, 234 U. S. 360, 34 Sup. Ct. Rep. 806, the Supreme Court says:

"Looking at the terms of this provision it is manifest that the act of bankruptcy, which it defines, consists of three elements; the first is of insolvency of the debtor, the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon the property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect the greater percentage of his claim out of other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference, five days before a sale or final disposition of any property affected."

Petitioners were entitled to prove the act of bankruptcy as alleged, and they were denied their substantial rights when the trial court held that no such act of bankruptcy existed.

POINT II.

The Trial Court Committed Reversible Error and Denied the Petitioning Creditors Their Rights When He Refused to Receive in Evidence the Exemplified Record of Youngblood vs. Dysart.

Petitioning creditors were entitled to prove Stella Dysart was insolvent during the four months' period and immediately prior to the filing of their petitions. [Tr. p. 221.] They were entitled to show what became of Stella Dysart's property which caused her to be insolvent. The exemplified record of the proceedings in Youngblood v. Dysart in McKinley County, New Mexico, showed what became of Stella Dysart's property. The record showed that the real property was sold and disposed of. The record also contained the final judgment which showed, at least in part, the existence of the debts of Stella Dysart. It was incumbent upon the petitioning creditors to show that Stella Dysart owed debts in excess of the statutory one thousand dollars. Likewise, when the court refused to permit the introduction of the exemplified record from McKinley County, in the case of Youngblood, plaintiff, v. Stella Dysart [Tr. pp. 220-221, incl.], it committed a reversible error and denied the petitioning creditors their substantial rights in court, for that judgment showed a disposition of Stella Dysart's property, and showed indebtedness of Stella Dysart.

POINT III.

The Trial Court Committed Reversible Error in Denying to Petitioning Creditors Their Substantial Rights When It Denied the Creditors the Right to Prove Insolvency, to Prove Their Status as Creditors, and to Prove the Nature, Amount and Extent of the Indebtedness of Stella Dysart, and Dismissed the Bankruptcy Proceeding.

After the trial court had announced its decision that it did not consider the acts of bankruptcy alleged capable of proof because of the fact that a judgment in New Mexico, like one in California, constitutes an apparent lien against real properties of the judgment debtor within the county, the creditors offered to prove that Stella Dysart was insolvent at the times complained of and within the four months' period required by the statute. The creditors offered to prove that they, and each of them, were creditors, having provable claims against the bankrupt in excess of the statutory amount. They offered to prove that they, and each of them—fifty-two in number—were creditors at the time complained of, and that Stella Dysart owed in excess of the statutory one thousand dollars, and was insolvent at the times the acts of bankruptcy were committed and was insolvent at the time the creditors' petitions were filed. The trial court refused to permit this proof on the ground that the facts and the record relied upon by the petitioning creditors, did not constitute acts of bankruptcy. While this was a short-cut method of ending the trial, it did in fact constitute a continuing error.

Conclusion.

It is apparent from the statement of the facts above and a mere reference to subdivision 3 of Section 3 of Chapter 3 of the Bankruptcy Act, that the order dismissing the proceedings was erroneous.

We respectfully submit that these fifty-two petitioning creditors are entitled to prove the acts of bankruptcy alleged, and that the proof offered was the best evidence of such facts; that the same proves the acts of bankruptcy alleged.

We respectfully submit that the trial court's order should be reversed and that the matter be sent back for trial on the merits.

Respectfully submitted,

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Counsel for Petitioning and Intervening Creditors.